No. 82-1046

In The

Supreme Court of the United States

October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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The petitioner, Kane Gas Light and Heating Company, replies to statements made in respondent's opposition brief, as follows:

Note: Respondent's brief at page 2, under the heading "Jurisdiction" also misstates the date of the filing of the petition for a writ of certiorari as December 9, 1982. The petition was filed and docketed on December 8, 1982, of which fact the respondent has been duly notified.

With Respect to Inaccurate and Misleading Statements Appearing in Respondent's Brief

1. Although the respondent does not express a dissatisfaction with petitioner's statement of the case, nevertheless, the respondent has made a counter statement (in abbreviated form) of certain facts, which statement is inaccurate and incomplete. It is an apparent effort to mislead this Court into believing that the discharged employee had only made a mistake of judgment of such minor nature as would not merit discharge. Truly, that was not the situation at all.

Compare the respondent's statement made in its brief (at pages 2 and 3) with the facts set forth in petitioner's statement (Pet. at 3-6) and with the facts stated by Judge Garth in his opinion for the Third Circuit (Pet. at 2a-5a) and with the facts stated by Judge Knox in his opinion for the district court (Pet. at 22a-25a) and with the facts recited by the arbitrator in his opinion (Pet. at 54a-56a).

Pritchard had been employed by the Company for seven years in the Borough of Mt. Jewett (where Pritchard lived) as a field worker who performed work under direct instructions of his foreman. Pritchard had no judgmental discretion in the operation of any of the gas valves at the Mt. Jewett regulator station. He opened and closed those valves only on the specific instructions from his supervisors. Pritchard was well aware, however, of the functions of the two valves in question.

As stated by Judge Garth for the circuit court (Pet. at 3a):

> One was a "by-pass valve", which could be opened to increase the gas flow at times of increased demand for gas; the other was a "main valve", which was used only if it became necessary for

testing or repair purposes to shut off the main gas transmission line entirely.

Pritchard was *not* ordered by his supervisor "to increase gas pressure in the Kane, Pennsylvania area" (as respondent states in its brief at p. 2). Correctly stated, Pritchard, in Mt. Jewett, was specifically instructed by his foreman in Kane, via radio, to "open the by-pass valve" (Pet. at 4 and 55a).

Pritchard was *not* instructed "to reduce pressure in Kane by turning off a by-pass valve" (as respondent states in its brief at p. 2). Correctly stated, Pritchard, in Mt. Jewett, was ordered by the foreman by radio from Kane "to close the by-pass valve" (Pet. at 4 and 55a), and Pritchard reported by radio back to his foreman in Kane that he had "closed the by-pass valve" (Pet. at 4 and 55a). (That valve was closed by a wheel.)

However, unknown to, and concealed from, his foreman and supervisors, was the fact that Pritchard also closed the "main valve" in a different part of the regulator station in Mt. Jewett. (That valve was closed with a wrench.) By the closing of the "main valve", Pritchard effectively cut off most of the gas being transported from Mt. Jewett to the Borough of Kane, when the temperature stood at about zero degrees Fahrenheit. Thereafter, a dangerous drop in pressure was noted in Kane, and the supervisors there, being unable to raise Pritchard in Mt. Jewett, on the radio or by telephone, had the foreman drive from Kane to Mt. Jewett (a distance of nine miles) to find out what was happening. The foreman found that the "main valve" had been closed by Pritchard. The foreman turned the "main valve" back on. The loss of adequate gas supply had lasted for forty-five minutes.

2. With respect to the statement in the respondent's brief at page 4 about the U.S. Department of Transportation regulations governing transmission of natural gas in interstate commerce, with the possible implication that the petitioner-Company's lines would not be covered, it should be noted that those regulations and the provisions of the Natural Gas Pipeline Safety Act of 1968, do in fact apply to the pipelines of the Kane Gas Company (*see* Pet. at 41a).

3. Respondent's brief misstates the facts when it recites (at page 2 of its brief) "the parties by mutual consent agreed to submit the grievance concerning the discharge of Pritchard to *binding* arbitration" (emphasis supplied; *citing* Pet. at 25a). That citation to Judge Knox's district court opinion *does not* refer to any agreement for *binding* arbitration. Also as shown by a footnote to Judge Garth's circuit court opinion (Pet. at 5a), the Company had contended it had not agreed to "binding" arbitration, and that contention was not ruled upon by either the district or the circuit court.

4. The respondent, at page 7 of its brief, also misstates the language of the court of appeals (Pet. at 15a) when the brief states that the public policy basis for vacating arbitrator's awards applies only where the award *itself* would conflict directly with either federal or state law. The word "itself" was added by the respondent. Further on, in Judge Garth's opinion (Pet. at 16a), the circuit court approved the holding of *General Teamsters, et al. Local 249 v. Consolidated Freightways,* 464 F. Supp. 346 (W.D. Pa. 1979) stating:

> *Consolidated Freightways* stands for the proposition that an award is inconsistent with public policy when it would condone violations of federal or state law. The decisions of other circuits

> suggest *that absent such a finding that an award condones a violation of federal or state law,* the strong federal policy of encouraging labor arbitration dictates the enforcement or arbitration awards.

5. The respondent's brief at page 7 misstates the language of the court of appeals when it states that the court concluded "that there was no federal or state law that would compel discharge." Correctly stated, the circuit court concluded (Pet. at 17a):

> The Company has not brought to our attention any federal or state law that would compel the harsher sanction of discharge, no doubt because no such law exists. Thus, we conclude that the award here cannot be vacated on the ground that it is inconsistent with public policy.

The petitioner-Company did in fact submit to the circuit court the federal and state laws which required the Company (and naturally its employees) to operate its gas distribution business in a safe manner in accordance with federal regulations.

The petitioner-Company did in fact call the circuit court's attention to the provisions of the Pennsylvania Crimes Code — by a timely petition for rehearing before the court en banc (Pet. at 41a-44a), which the circuit court declined to consider, by dismissal of the petition for rehearing.

6. Respondent's brief at page 10, misstates the language of the arbitrator where it says, that ". . . he wrote that there was no conclusive evidence of *improper* motivation on Pritchard's part (Pet. App. at 25a) . . ." and where it states "the arbitrator's conclusions concerning *improper* motivation hardly changes the

burden of proof." The respondent has seen fit to insert the word "improper" before the word "motivation" at two places. The arbitrator had not referred to "*improper* motivation" at all. In passing, it should be noted that the motivation was crystal clear as to why he shut the "main valve". It was to shut off the gas to the Borough of Kane.

7. The respondent's statement in its Brief, omits reference, not only to the concealment by Pritchard of his act of shutting off the "main valve", but also omits reference to the fact that the Company's discharge of Pritchard was prompted by reasons of safety.

With Respect to Respondent's Argument

8. Pritchard's defense of his action in shutting the main valve, as being a "mistake" is not a credible one. He deliberately and knowingly shut the valve — to shut off the gas supply to Kane. His purpose, he stated at one time was that "he had thought (Kane) didn't need that gas either"; at another time he stated his purpose was "I shut the four inch by-pass valve off and I figured if he had lots of gas, I might as well shut this valve off to build the line back up" (Arbitrator's Opinion — Pet. at 59a). At another time, during the hearing, his sole explanation for his conduct was that he "just thought (he) was saving the Company some money." (Circuit Court's Opinion — Pet. at 10a).

9. Judge Garth, in his opinion for the circuit court (Pet. at 5a) stated:

> Considering the severity of the weather, Pritchard's actions in closing the main valve could easily have resulted in danger to life as well as substantial property damage.

Judge Knox, for the district court (Pet. at 23a-24a) stated:

> The hazards of turning off the gas completely in weather such as this is demonstrated by the testimony at the arbitrator's hearing, page 12, to the effect that one of the gravest dangers is that when the transmission line is void of gas, the pilot lights go out on appliances and furnaces, leaving the valve open with the result when it returns, there is an explosive concentration of gas and air and could cause possibly catastrophic results.

The arbitrator (Pet. at 60a) stated:

> (Pritchard) admittedly acted errantly, beyond the scope of his assigned authority, and beyond the scope of his foreman's orders, and certainly the fact of the potentially dangerous situation cannot be set aside.

On the findings of the circuit court, the district court and the arbitrator, it must be concluded that Pritchard's misconduct in recklessly and secretly closing the "main valve" to shut off the main supply of gas to Kane, created a risk of catastrophe by explosion and fire and from lack of heat, with potential dangers to persons and to property. That type of misconduct is regarded as very serious in Pennsylvania, with a penalty for greater than a thirty day suspension.

Such conduct is prohibited by the Pennsylvania Crimes Code of 1972 [18 Purdon C.P.S.A. 3302(b)] (Pet. at 42a), relating to "Risking a Catastrophe" which section defines the offense as a felony in the third degree which carries a penalty of imprisonment up to seven years and a fine of up to $15,000 (18 Purdon C.P.S.A. §§1101 and 1103).

The penalty for a misdemeanor of the second degree, provided for in the Pennsylvania Crimes Code, for "Failure to Prevent Catastrophe", "Criminal Mischief" and "Recklessly Endangering Another Person" cited in the petition at pages 42a-44a, is imprisonment up to two years and a fine not exceeding $5,000 (18 Purdon C.P.S.A. §§1101 and 1104).

10. The petitioner submits some additional questions to the Court. If this arbitrator's award is not set aside, what defense, moral or legal, is available to the Company if its rehired employee, intentionally, recklessly or negligently, caused bodily harm or property damage to others in the course of his employment?

Would it be a proper moral or legal justification for the Company to claim that the rights of the citizens of Kane and Mt. Jewett must give way to a requirement that the courts would not set aside an arbitration award which required the retention of a reckless employee?

Justice Holmes spoke with common sense and wisdom when he stated for this Court in *Beasley v. Texas & Pacific Railway Co.*, 191 U.S. 492 (1903) at page 498:

> But the very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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